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IN THE

Supreme Court of the United States

October Term, 1957.

No. 442

MILDRED S. STINSON, as Administratrix of the Estate of A. BRUCE STINSON, Deceased, Suing as Such Administratrix,

Petitioner,

v.

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA.

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IN THE

Supreme Court of the United States.

October Term, 1957

No.

MILDRED S. STINSON, AS ADMINISTRATRIX OF THE ESTATE OF A. BRUCE STINSON, DECEASED, SUING AS SUCH ADMINISTRATRIX,

Petitioner

v.

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA.

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States.

MILDRED S. STINSON, by her attorneys, respectfully requests that a Writ of Certiorari issue to review the final judgment of the Supreme Court of Alabama entered on June 20, 1957.

OPINIONS BELOW.

A photostatic copy of the original opinion of the Supreme Court of Alabama, filed March 31, 1955, and certified by the Clerk of that Court to be a "full, true and correct" copy of said opinion appears at pages 1a to 13a of the Appendix to this Petition. The opinion of the Supreme Court of Alabama, dated June 20, 1957, on the judgment here for review is reported at — Ala. —, — So. 2d, —, and merely adopts the original opinion of March 31, 1955. It appears at pages 25a to 26a of the Appendix. What *purports* to be the original opinion is reported sub nom. *Atlantic Coast Line Railroad Company v. Stinson*, 264 Ala. 522, 88 So. 2d 189, and appears at pages 15a to 24a of the Appendix. These published reports, however, contain curious and unexplained material differences from the certified copy furnished to counsel by the court. No notice of any alteration or amendment of the original opinion was ever given to counsel.

JURISDICTION.

The judgment of the Supreme Court of Alabama was entered on June 20, 1957 (R. 326).[1] The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3) since rights are claimed by petitioner under a statute of the United States.

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1. All further references are to the pagination of the record of the second trial.

QUESTION PRESENTED.

Where, in an F. E. L. A. action, a fireman moved a train (1) without authority and (2) without giving the proper signals, both of which were violations of the company rules and which the Supreme Court of Alabama conceded to be sufficient evidence of negligence, and where petitioner's decedent, the engineer, was killed by that very move, was not the holding of the Alabama Court that the negligence did not "proximately cause" the accident an application of a wrong rule of law, "capricious or unreasonable", in conflict with the decisions of this Court and of the several Courts of Appeals, and did it not "evince hostility to the federal statute"?

THE STATUTE INVOLVED.

The Federal Employers' Liability Act, 45 U. S. C., § 51 [Apr. 22, 1908 c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404] which provides as follows:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment . . . "

STATEMENT OF THE CASE.

1. *Procedure and How Federal Question is Presented*

Petitioner instituted suit in the Circuit Court of Jefferson County, Alabama, on September 18th, 1952 claiming rights under the F. E. L. A., 45 U. S. C. § 51 *et seq.* for the death of her husband. It came on for trial on June 8, 1953. Then respondent began a series of the most dilatory tactics imaginable, protracted and repeated throughout the entire trial, until the verdict on June 12, 1953: see Record, *passim*. Respondent's motion for a new trial was argued August 21, 1953, and was finally decided, adversely to respondent, on February 26, 1954—over 6 months later.

Respondent appealed to the Alabama Supreme Court in March, 1954, but no argument was had until November 24, 1954—8 months later. Four months more elapsed before the Supreme Court handed down its decision, on March 31, 1955, reversing and remanding. A timely motion for rehearing was filed by petitioner within 15 days, which was refused on June 21, 1956—a delay of one year and three months.

Then, petitioner found herself starting over again, without the opportunity for a direct review by this Court, because instead of having a final judgment, she had only a new trial with no additional evidence available.

Petitioner returned to Jefferson County in November, 1956, and offered the previous record in evidence. The trial court in obedience to the previous mandate of its Supreme Court directed a verdict for respondent. Petitioner appealed the same day. Seven months later, and over 4 years after the original trial, petitioner at length obtained a final judgment, entered June 20, 1957, which she could bring here for review.

At the trial all of the evidence came from respondent's employees, called by petitioner. Respondent put on no defense, and there was no conflict in the evidence.

2. *The Facts.*

This is a case of a railroad engineer who was cut in half when his fireman moved the train without authority and without signals.

On the day after the accident, the fireman was discharged by respondent for "inexcusable violation of the rules endangering property and life and operating an engine in the absence of the engineer" (R. 170).

The Supreme Court of Alabama conceded the fireman's negligence in violating the rules, but held the case not submissible to a jury on the question of causation.

In essential detail the uncontradicted evidence was as follows:

On August 6, 1951, a wrecking train (Work Extra 1707) proceeded west from Ramer, Alabama to the scene of a five car derailment (R. 85). The crew was: Engineer Stinson (petitioner's decedent), Fireman Cook, Conductor Cloud and Brakemen Hays and Murphy (R. 120).

Beginning at its east end the train was made up of the following cars (R. 146):

Caboose
Living and white dining car
Kitchen car
Bunk car
Flat car with wheels and rails (wheel car)
Gondola car with coal
Gondola car with ties
Engine
Wrecker tank
Wrecker.

After cutting off all seven cars behind the engine (R. 122), Stinson moved (R. 171) the engine and the wrecker cars four car lengths up to the wreck (R. 123). When Stinson had spotted the engine (R. 171) for the re-railing, fireman Cook left the engine and walked to the wreck with Stinson still aboard the engine (R. 171).

Cook never again saw Stinson alive (R. 173, 174). At 10:15 P. M., another wreck train, the Western Wrecker, arrived at the western end of the derailed cars (R. 95). At 10:30 P. M., No. 1707 left for Ramer, operated by fireman Cook, who was not a qualified engineer (R. 171). Within those fifteen minutes, these events occurred in this sequence:

(a) The fireman of the Western Wrecker, McClain, left his engine and walked seven car lengths (R. 85), or 315 feet to No. 1707.

(b) McClain had a conversation with Stinson in the cab of 1707 (R. 189).

(c) Stinson walked nine car lengths, or 405 feet, to the dining car and ordered a meal for himself and fireman Cook (R. 115).

(d) Both dinner plates were prepared (R. 115, 116).

(e) Stinson ate his dinner (R. 115, 116, 118).

(f) Stinson left the dining car in haste, leaving behind the fireman's dinner plate (R. 116) and his own hat (R. 99).

In those same fifteen minutes fireman Cook made two separate movements of the engine, the second of which was a coupling move. It is an inescapable inference (and probably the only one) that the impact of the coupling startled Stinson into an awareness that his engine was being moved without authority and in his absence, and that it was this realization which sent him from the diner in such great haste.

Fireman Cook then operated the train all the way back to Ramer with Stinson's whereabouts unknown (R. 173, 174, 175).

Stinson's body was found about 4,000 feet from the point of the derailment (R. 199). The lower part was be-

tween the rails, with the feet angling down the hill toward the west (R. 199). The upper part was north of the rail, with the head also angled to the west (R. 199). The arms were pulled back to the shoulders; the hands were gripped (R. 200). The body had been dragged easterly to a point about 150 feet east of where his clothes were found "in a wad" (R. 200). There was blood on the tracks and scuff marks indicated he had been dragged east toward Ramer (R. 200, 201, 206).

When the train was later inspected, a great deal of blood was found on the northeast wheel of the wheel car (R. 101, 102, 106, 108, 147) and a small amount on the body bolsters and truck bolsters of the same car (R. 101, 102). Portions of the stomach and lungs were found between the brackets of the wheel (a roll of metal cast into the inside of the wheel) (R. 102). There was no blood on the wheels of the caboose or of the other cars between it and the wheel car (R. 130).

Respondent's Rule 994 provides as to firemen (R. 142):

> "They must remain on engines during switching operations, unless otherwise directed. They must take charge of the engine should the engineman be absent, and must not leave the engine during absence of engineman, nor permit any unauthorized person upon the engine. If engineman should become disabled they must stop the engine. *They must not run the engine in the absence of the engineman* unless, in an emergency, they are directed to do so by the conductor or some other person in authority." (Emphasis supplied.)

In spite of this Rule, and although he had no authority from the conductor or any other person in authority (R. 126), and was not a qualified engineer (R. 171), fireman Cook ran the engine two and one-half to three miles east to Ramer in the absence of engineman Stinson (R. 173).

Respondent's Rule 30 provides (R. 195):

> "The engine bell must be rung when an engine is about to move except in instances where the stop and start, either forward or backward, is momentary, and is a continuous switching move and while approaching and passing public crossings at grade, while passing through yards and stations, when passing trains on an adjacent track, and when necessary to prevent accidents."

The bell was not rung at all although to ring it merely involved turning a valve (R. 173).

Respondent's Rule 14(h) requires three short blasts of the whistle when a standing train intends to back (R. 197, 198). No whistle was blown before the move to Ramer began (R. 173).

Factually these established numerous adequately supported inferences that Stinson was directly killed because of one or more of the conceded negligent acts.

On this evidence, the original jury returned a verdict for petitioner of $46,600.00 (R. 30, 31). There followed the state court proceedings described above, in the course of which there occurred the curious and extraordinary episode in connection with the opinions in this case.

REASONS FOR GRANTING THE WRIT.

For the purpose of clarity, a statement of reasons for granting the writ is here set forth. These are expanded in the argument following this resumé.

1. The decision below formulated erroneous rules of law in conflict with the decisions of this Court.

(a) It formulated an erroneous rule of law in conflict with *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409 (1944); *Coray v. Southern Pac. Co.*, 335 U. S. 520, 69 S. Ct. 275 (1949); *Schulz v. Pennsylvania Railroad Company*, 350 U. S. 523, 76 S. Ct. 608 (1956); and *Rogers v. Missouri Pacific Railroad Co.*, 352 U. S. 500, 77 S. Ct. 443 (1957), rehearing denied 353 U. S. 943, 77 S. Ct. 808 (1957).

(b) It erroneously held that unless there was affirmative proof that an F. E. L. A. employee was injured or killed at a point where his duties required him to be, there could be no causative negligence. This is in conflict with *Tennant v. Peoria & P. U. Ry. Co., supra; Schulz v. Pennsylvania Railroad Company, supra,* and *Ringhiser v. Chesapeake & Ohio Railway Co.*, 354 U. S. 901, 77 S. Ct. 1093 (1957).

(c) Having erroneously required affirmative proof of coincidence of duty location and injury location [See 1(b), *supra*], it erroneously refused to follow the presumption announced by this Court that decedent was, in fact, where his duties required him to be when killed: *Tennant v. Peoria & P. U. Ry. Co., supra.*

2. Since these erroneously formulated rules of law were applied by the court below, its decision necessarily resulted in "clear legal error" from the application of "wrong legal standards to the particular facts before it": Cf. *Rogers v. Missouri Pacific Railroad Co., supra,* at 352 U. S. 562, 77

S. Ct. 480; and *McBride v. Toledo Terminal Railroad Company*, — U. S. —. 77 S. Ct. 1398 (1957).

3. The decision below was "capricious [and] unreasonable action" and "evinced hostility to the federal statute": Cf. *Rogers v. Missouri Pacific Railroad Company, supra,* at 352 U. S. 562, 77 S. Ct. 480; and *McBride v. Toledo Terminal Railroad Company, supra,* at — U. S. —, 77 S. Ct. 1398.

4. The decision below is in conflict with the decisions of the Courts of Appeals in the Second Circuit in *Anderson v. Baltimore & O. R. Co.*, 89 F. 2d 629 (C. A. 2, 1937), cert. den. 302 U. S. 696, 58 S. Ct. 14 (1937); in the Third Circuit in *Hoyt v. The Central Railroad,* 243 F. 2d 840 (C. A. 3, 1957); and in the Seventh Circuit in *Eglsaer v. Scandrett, et al.,* 151 F. 2d 562 (C. A. 7, 1945).

5. In denying petitioner her right to a jury trial, the decision conflicts with the command of this Court in *Tennant v. Peoria & P. U. Ry. Co., supra,* and *Lavender v. Kurn,* 327 U. S. 645, 66 S. Ct. 740 (1946), and therefore, "special and important reasons for the grant of certiorari" exist: *Rogers v. Missouri Pacific Railroad Company, supra,* at 352 U. S. 510, 77 S. Ct. 451; and see *Wilkerson v. McCarthy,* 336 U. S. 53, 69 S. Ct. 413 (1949) and *Ellis v. Union Pac. R. Co.*, 329 U. S. 649, 67 S. Ct. 598 (1947).

6. The decision below is a grave emasculation of the remedies vouchsafed to untold thousands of F. E. L. A. employees by a solemn Act of Congress.

Unless corrected by the grant of the Petition and reversal of the judgment below, it will breed much additional litigation and numerous appeals on the issues created by the conflict in authorities.

> "Cognizant of the duty to effectuate the intention of the Congress to secure the right to a jury determination, this Court is vigilant to exercise its power of

review in any case where it appears the litigants have been improperly deprived of that determination. Some say the Act has shortcomings and would prefer a workmen's compensation scheme. The fact that Congress has not seen fit to substitute that scheme cannot relieve this Court of its obligation to effectuate the present congressional intention by granting certiorari to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction. . . .'' *Rogers v. Missouri Pacific Railroad Co., supra,* 352 U. S. 509, 77 S. Ct. 450.

ARGUMENT.

Introduction.

The original opinion of March 31, 1955, furnished to counsel by the Clerk of the Alabama Supreme Court and certified as a "full, true and correct" copy refers to causal relationship in seven different places. Oddly enough when "that" opinion of the Alabama Supreme Court was published at 264 Ala. 522, 88 So. 2d 189 (1956), over a year after the original opinion was filed, the words "in whole or in part" had been added to five of the seven references to "proximate" causation. This discrepancy must now be faced. The opinion on the judgment presently under review in this Court merely adopts the original opinion of March 31, 1955. Thus to determine the reasoning underpinning this judgment we have to return to the certified "full, true and correct" copy of the original opinion, but when we do we find that it was transmuted in the reports. This alteration occurred without notice to counsel.

Here follows a parallel comparison between the pertinent portions of the original opinion, reproduced photographically in the Appendix (1a to 13a), *infra* and those reported at 264 Ala. 522, 88 So. 2d 189 (15a to 24a). All emphases are supplied.

Original Certified Opinion	Published Opinion
1. "Under the plain provisions of the Federal Employers' Liability Act the gist of the action is negligence on the part of the defendant which *proximately caused* the injury complained of. The plaintiff is required	"Under the plain provisions of the Federal Employers' Liability Act the gist of the action is negligence on the part of the defendant which *in whole or in part proximately caused* the injury complained of.

Original Certified Opinion	Published Opinion
to present probative facts from which the negligence alleged and the *casual relation* between the negligence and the injury complained of can be reasonably inferred before such issues may be submitted to the jury." (7a-8a)	The plaintiff is required to present probative facts from which the negligence alleged and the *causal relation* between the negligence and the injury complained of can be reasonably inferred before such issues may be submitted to the jury." (20a-21a)
2. "In *Lavender v. Kurn,* supra, the Supreme Court of the United States held that the case was a case for the jury, that actionable negligence may be established by circumstantial evidence and that where the jury returns a verdict on probative facts from which negligence which *proximately caused* the injury may reasonably be inferred, it is no answer to say that the jury's verdict involved speculation and conjecture." (8a)	"In Lavender v. Kurn, supra, the Supreme Court of the United States held that the case was a case for the jury, that actionable negligence may be established by circumstantial evidence and that where the jury returns a verdict on probative facts from which negligence which *in whole or in part proximately caused* the injury may reasonably be inferred, it is no answer to say that the jury's verdict involved speculation and conjecture." (21a)
3. "* * * the court [in *Lavender v. Kurn*] held that where there was proof of probative facts from which it could be inferred that the negligence of the railroad *caused* the death of the dece-	"* * * the court [*in Lavender v. Kurn*] held that where there was proof of probative facts from which it could be inferred that the negligence of the railroad *in whole or in part proximately*

ORIGINAL CERTIFIED OPINION	PUBLISHED OPINION
dent, the court on appeal would not disturb the verdict on the theory that the jury speculated as to whether death was the result of negligence or grew out of some other cause." (8a)	*caused* the death of the decedent, the court on appeal would not disturb the verdict on the theory that the jury speculated as to whether death was the result of negligence or grew out of some other cause." (21a)
4. "This brings us to what we regard as the vital question in the case. Did the negligence, if any, of the defendant railroad *proximately result* in the death of Stinson?" (10a)	"This brings us to what we regard as the vital question in the case. *Did the negligence, if any, of the defendant railroad in whole or in part proximately result* in the death of Stinson?" (22a)
5. "However, as we have pointed out, there was no evidence as to what happened after he left the diner and we can only speculate as to what *proximately caused* Stinson's death * * *" (11a)	"However, as we have pointed out, there was no evidence as to what happened after he left the diner and we can only speculate as to what *proximately caused* Stinson's death * * *" (23a)
6. "Consequently the evidence fails to show probative facts from which a jury could infer that when Stinson was run over by the train, he was where his duty required him to be. Since this is true, the evidence does not show that the negligence, if any, of the defend-	"Consequently the evidence fails to show probative facts from which a jury could infer that when Stinson was run over by the train, he was where his duty required him to be. Since this is true, the evidence does not show that the negligence, if any, of the defendant *in*

Original Certified Opinion	Published Opinion
ant *proximately caused his death.*'' (11a)	*whole or in part proximately caused* his death.'' (24a)
7. ''* * * *Reynolds v. Atlantic Coast Line R. Co.*, supra. In the last cited case *the Supreme Court of the United States* said:	''* * * Reynolds v. Atlantic Coast Line R. Co., supra. In the last cited case *this court* said:
'A party claiming under the Act must in some adequate way establish negligence, and it must appear that such negligence was the proximate cause, in whole or in part, of the accident.	'A party claiming under the Act must in some adequate way establish negligence, and it must appear that such negligence was *the proximate cause, in whole or in part*, of the accident.
* * *	* * *
'In order to state a cause of action, it must be made to appear by proper averments [and, we interpolate, by proper proof] that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.'' (11a-12a)	'In order to state a cause of action, it must be made to appear by proper averments [and, we interpolate, by proper proof] that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.'' (24a)

At the outset we must be candid with this Court and advise it that we are faced with the problem of dealing not with one, but, in effect, with two opinions below. We propose to treat this bizarre situation created by the court below by establishing the following propositions:

1. If the first opinion is the source of the decision below, it propounds a rule of Federal Employers' Liability Act law in conflict with the rule laid down by this Court and other appellate courts, a conflict of such magnitude as to warrant the grant of the Petition and reversal of the judgment below.

2. The manner in which the altered opinion came into existence, on a set of facts which were unchanged from those of the first opinion, fairly suggests that the second opinion is the spawn of copy-editing rather than the product of jurisprudence. If so, it is the sheerest form of arbitrariness and capriciousness. If the altered opinion is the result of something more substantial than decision-making by copy-editing, then the result on these facts, which are in substance agreed upon, is so incredibly arbitrary and capricious and so manifestly the reflection of studied hostility to the purposes of the Federal Employers' Liability Act that the Petition should be granted and the judgment below reversed.

POINT I.

The Law Propounded in the First Opinion is in Conflict With the Rule Laid Down by This Court and Courts of Appeals.

The passages of the first opinion which use such terms as "proximately caused", "caused", "proximately resulted" and "the proximate cause" obviously demonstrate that the rule of causation promulgated by the court below is in sheer conflict with the applicable rule as formulated in 45 U. S. C. § 51 and the decisional law announced by this Court and the Courts of Appeals under that statute.

The rule expressed in the lower court's first opinion is an outmoded conceptualistic view of causation, extremely narrow and restricted. At the time it issued the first opinion on March 31, 1955, the court below either ignored or overlooked those federal cases which carefully explained how that doctrine had been intentionally expanded and broadened by the use in the statute of the words "in whole or in part"; See *Eglsaer v. Scandrett*, 151 F. 2d 562 (C. A. 7, 1945); *Anderson v. Baltimore & O. R. Co.*, 89 F. 2d 629 (C. A. 2, 1937), cert. den. 302 U. S. 696, 58 S. Ct. 14 (1937); *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409 (1944); *Coray v. Southern Pac. Co.*, 335 U. S. 520, 69 S. Ct. 275 (1949).

Sweeping aside the distinctions which the Utah Supreme Court sought to draw between proximate cause in the legal and philosophical sense, this Court, through Mr. Justice Black said, in *Coray* at page 524 (69 S. Ct. 277):

> "* * * The language selected by Congress to fix liability in cases of this kind is simple and direct. Consideration of its meaning by the introduction of dialectical subtleties can serve no useful interpretative purpose. The statute declares that railroads shall be responsible for their employees' deaths 'resulting in whole or in part' from defective appliances such as were here maintained * * *."

Thus, without reference to what subsequently developed in appellate decisional law between the dates of the lower court's first opinion, and its opinion on the second appeal, even at the time of the first opinion here the federal cases had left no doubt that the old common-law concept of "proximate cause" had no place in suits under this Act. But it was that concept which the Alabama court applied.

Whatever excuse may possibly be offered for ignoring or overlooking these cases, and we submit there can be none, there is no possible reason for the lower court's refusal to

recognize the proper legal standard expressed by this Court in *Rogers v. Missouri Pacific Railroad Co.*, 352 U. S. 500, 77 S. Ct. 443 (1957).

In that case Mr. Justice Brennan vigorously criticized the Missouri Supreme Court for using language of proximate causation.

This Court said of the Missouri Court opinion, at page 506 (77 S. Ct. 448):

> "* * * *That is language of proximate causation* which makes a jury question dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury." (Emphasis supplied.)

This Court then held as follows at pages 506, 507 (77 S. Ct. pp. 448-449):

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or *in part* [to its] negligence' * * *". (Emphasis the Court's.)

See also *Webb v. Illinois Central Railroad Co.*, 352 U. S. 512, 77 S. Ct. 451 (1957).

Obviously the first opinion in this case is in utter conflict with the above cited cases of this Court and the Courts of Appeals.

Following shortly in the wake of the *Rogers* decision, *supra*, the Court of Appeals for the Third Circuit had occasion to determine the effect of that decision on the legal standard of causation to be applied in Federal Employers' Liability Act cases.

In *Hoyt v. The Central Railroad*, 243 F. 2d 840 (C. A. 3, 1957), Judge Kalodner said at pages 842, 843:

> "Under the Act proof of negligence on the part of the defendant railroad is, as in the common law, a prerequisite to liability. However, the common law concept of proximate cause has been adopted to a lesser extent. At common law the proximate cause of the accident was the efficient cause or a substantial factor in producing the injury. Cf. Restatement, Torts, secs. 431, 433 (1934). Since the Act provides that liability is incurred for injuries resulting 'in part' from the defendant's negligence, liability exists where there are a plurality of causes including the negligent act of the defendant. See Eglsaer v. Scandrett, 7 Cir., 1945, 151 F. 2d 562 . . .
>
> "Thus the situation must be viewed in light of the several factors which may have combined to cause the accident, and if any negligence on the part of the defendant is found among these factors, it would be liable for the resultant injuries. . . . Any instructions to the jury on the element of proximate causation must necessarily define liability to include a greater area than that at common law * * *."

There can be no doubt that the first opinion of the Supreme Court of Alabama is in direct conflict with this

decision of the Court of Appeals for the Third Circuit. The *Hoyt* case reversed the District Court because it used the words "the proximate cause." Yet, using the words "the proximate cause" (12a), the first opinion in this case reverses the trial judge.

From this perspective we now see the magnitude of the conflict generated by the first opinion. If no further appellate decisional law on the point had developed after the announcement of the first opinion below, there would be such conflict as between the rule in the court below and the rule in this Court and Courts of Appeals as to warrant the grant of the Petition. The remedy under the Federal Employers' Liability Act was genuinely emasculated by that conflict. But in fact additional appellate decisional law did develop after the first opinion, and the effect of that new law was to aggravate the error and sharpen the conflict already existing. The *Rogers; Webb* and *Hoyt* cases, *supra*, undeniably erased any remaining vestiges of rigid legalisms such as those applied below in the meaning of causation under the Federal Employers' Liability Act. The first opinion stands alone in its stark error.

Point II.

The Altered Opinion Is in Conflict With the Decisions of This Court and the Several Courts of Appeals.

We have advised this Court of the curious mutation through which the first opinion went between the time of its promulgation and its eventual publication at 264 Ala. 522, 88 So. 2d 189. We shall now proceed to assume that the altered opinion expresses the basis on which the Supreme Court of Alabama decided this case. We must admit, however, that how or why the words "in whole or in part" mysteriously appeared, with no notice to counsel, is not at once apparent. They appeared only after the lapse of more than a year and three months from the date of the original opinion and after the court's basic error had been

pointed out in our petition for rehearing. It may be that the lower court felt that the quiet addition of a magic incantation would somehow or other breathe validity into an indefensible legal position. But whatever the reason for the sudden and unexplained appearance of these words, they remain only words and cannot by their mere presence alter in any way the basic approach of the court to the question of causation or the legal standard which it applied.

Actually, the opinion is at war with itself. While the quotation from *Reynolds v. Atlantic Coast Line* was accurately ascribed in the published opinion to the Alabama Supreme Court instead of to this Court, that quotation with the Alabama phrases "the proximate cause" and "the natural and probable consequences" remained as a basis for the holding. This would tend to support equally the conclusions: (1) that the revision was mere copy-editing carelessly done, and hence pure mechanics, or (2) that the court below persisted in applying its own erroneous rule. However, we shall assume that something more than mere lip service was involved in the revision of the first opinion, and even assume that the revision was internally consistent.

If we make those assumptions we shall immediately see that the court was incredibly arbitrary and capricious and evinced a rampant hostility to the F. E. L. A.

And indeed, the holding is incredible.

The Alabama court conceded that the evidence of the unauthorized movement of the train was sufficient evidence of negligence.

Stinson was cut in half by that same negligent movement.

The Alabama court below necessarily held as a matter of law (assuming it had applied the correct rule), that there was not the slightest causal connection between that movement and the death.

Although we believe that it is unnecessary to state more than this to show how "capricious [and] unreasonable"

the holding of the court was, it might be helpful to indicate how the lower court reached its conclusion. There are four aspects to this analysis.

First, the court ruled as a matter of law that unless the evidence affirmatively shows that an employee is where his duties require him to be, any negligence of his fellow employees cannot be causative negligence under the Federal Employers' Liability Act.

The court said:

> "* * * Consequently the evidence fails to show probative facts from which a jury could infer that when Stinson was run over by the train, he was where his duty required him to be. Since this is true, the evidence does not show that the negligence, if any, of the defendant in whole or in part proximately caused his death * * *". (24a)

Assuming, *pro arguendo*, that petitioner did not affirmatively show that Stinson was where his duties required him to be at the time of the accident, we submit that to say that there must be affirmative and direct proof that an employee was injured or killed at a place where his duties required him to be is as novel as it is startling and as alien as it is erroneous.

In *Schulz, Admx. v. The Pennsylvania Railroad Company*, 222 F. 2d 540 (C. A. 2, 1955), decedent reported for work, checked four tugboats, and then went aboard to change his clothes. He was last seen alive walking in the direction of the nearest tug. His street clothes and lunch were later found on one of the tugs. Three of the tugs were unlighted and one was partially lighted. There was some ice on the tugs, although the ice did not cover them. Decedent's body was found two weeks later floating near an adjacent pier clothed only in shorts and socks. The Court of Appeals affirmed a directed verdict for defendant saying, at page 541:

"* * * The evidence of such alleged negligence was slight, and perhaps at most only doubtfully sufficient to prese it a jury question as to defendant's breach of duty. But beyond this, there was no showing whatsoever that the alleged conditions were causally related to the accident. Plaintiff never contended that the ice completely covered the barges or that the pier or the barges were entirely shrouded in darkness. We have no way of knowing how or where the accident occurred, and cannot say that it was proximately caused by any default on the part of the defendant. * * *".

This Court reversed the directed judgment for defendant: 350 U. S. 523, 76 S. Ct. 608 (1956). The Court said, at page 526 (76 S. Ct. 610):

"In this case petitioner is entitled to recover if her husband's death resulted 'in whole or in part' from defendant's negligence. Fair-minded men could certainly find from the foregoing facts that defendant was negligent in requiring Schulz to work on these dark, icy and undermanned boats. And reasonable men could also find from the discovery of Schulz's half-robed body with a flashlight gripped in his hand that he slipped from an unlighted tug as he groped about in the darkness attempting to perform his duties. But the courts below took this case from the jury because of a possibility that Schulz might have fallen on a particular spot where there happened to be no ice, or that he might have fallen from the one boat that was partially illuminated by shore lights. Doubtless the jury could have so found (had the court allowed it to perform its function) but it would not have been compelled to draw such inferences. For 'The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable'. Fact finding does not require mathematical cer-

tainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn.

"We think the evidence was sufficient to require submission of the case to the jury, and that it was error not to do so."

Surely petitioner here proved as much, if not more, concerning the decedent's whereabouts at the time of the accident than did the petitioner in the *Schulz* case, *supra*.

Second, let us, for the sake of argument, go even further. Let us assume that it was shown affirmatively that Stinson was *not* where his duties required him to be. Even under such assumption, negligence of a fellow employee is causative, as this Court recently held. Cf. *Ringhiser v. Chesapeake & Ohio Railway Company*, 354 U. S. 901, 77 S. Ct. 1093 (1957).

Third, after importing a novel and erroneous requirement of direct proof that the location of death and place of duties coincided, the court committed the further legal error of totally ignoring what this Court said in *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 34, 64 S. Ct. 409, 412 (1944):

"* * * To this evidence must be added the presumption that the deceased was actually engaged in the performance of those duties and exercised due care for his own safety at the time of his death. * * *"

Finally, suppose *Schulz*, *Ringhiser* and *Tennant* had never been decided the way they were. If we take the law to be what the court below says it is, the conclusion it draws on these facts is not just illogical, it is wildly arbitrary and capricious.

The court said (23a-24a):

> ". . . that in going to the diner Stinson was acting within the line and scope of his employment. His next duty would be to return from the diner to the engine . . . . Stinson had no duties to perform in between or alongside the cars of the train, as was the situation in Atlanta & St. Andrews Bay Ry. Co. v. Burnett, supra, and Atlantic Coast Line Railroad Co. v. McMoy, supra, referred to above. Alabama Great Southern R. Co. v. Davis, 246 Ala. 64, 18 So. 2d 737."

Since Stinson could only return to the engine by walking alongside the cars, the very duty recognized by the court would place him precisely where the court said he had no duties.

Out of what could only have been pure arbitrariness, the court below simply turned its back on the record which demonstrates without contradiction that Stinson must have been returning from the diner of the train to his engine very shortly before or at the time of the start of fireman Cook's final move east to Ramer. We know that Stinson left the diner in haste.

The only possible logical explanation for his leaving a place of safety (the diner) in such obvious haste is:

Stinson felt the jolt of the coupling. He realized that some unauthorized person,—and he knew not who,—was operating his engine for which he alone was responsible. It was this realization, stemming directly from the unauthorized operation of the engine, that brought him from safety to fatal peril.

We know also that Stinson left the diner at the end of a preceding sequence of events which must have consumed most of the time within a proven fifteen-minute interval: See Statement of the Case, *supra*, pp. 5-8. He could have been nowhere but at or near the diner, and there is nothing to suggest that he was headed anywhere

but back to the engine in an obvious effort to return to his station for the move to Ramer.

Indeed the evidence points conclusively to the fact that Stinson intended to return to the engine before it moved to Ramer. Otherwise, there would have been no point in his instructions to McClain to "look out for the engine" until he or Cook returned (R. 176), nor to his ordering a plate for the fireman (R. 115, 116). Thus, on the lower court's own terms, Stinson was exactly where his duties required him to be.

That being so, it is a fair—if not the only—inference that Stinson was probably caught up under the train, the tangle of brake beams, rigging, bolsters, trucks and spring plank under the car, as No. 1707 left the wreck. The "wadded up" clothes can be reasonably explained only on the basis that some portion of them was finally caught in the turning axle and inexorably torn from the body, permitting it to drop beneath the wheels. Whether Stinson slipped under the train while hurrying to the engine; whether he was knocked under by the unexpected movement made without warning; or whether he grabbed for a passing handhold which he ultimately lost and dropped under the train several thousand feet after the train started back to Ramer is of no moment. This was for the jury alone to decide. However he got there, he had a right to rely on Cook's compliance with the Rules.

Of course, that violation of Rule 994 and its continued violation in the move back to Ramer, both without knowledge of Stinson's whereabouts, were continuing acts of negligence. These were unquestionably causally related to the death no matter where it occurred. While he was at the scene of the wreck, decedent was entitled to rely on a warning by bell or whistle, or both. He was entitled to rely on the fact that Cook would not violate Rule 994 and operate the engine in his absence.

The ringing of the bell or the blowing of the whistle might well have saved his life: *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409 (1944).

Once the evidence is sufficient for the jury to find that the rule-violating movement was negligent (and this is conceded by the lower court) and that Stinson was killed by that movement at the time of the movement, (and this is beyond peradventure of doubt), we suggest that liability follows automatically. To hold that, on such evidence, the jury could not find that the negligent movement "played any part, even the slightest, in producing the injury or death for which damages are sought"[2] approaches, we submit, the zenith of absurdity.

CONCLUSION.

This Court has been diligent to protect F. E. L. A. claimants' right to jury trials. As this Court said in the *Rogers* case, *supra* at page 510, 77 S. Ct. 451:

> ". . . Special and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination."

In cases where the causal relationship between employer negligence and employee injury has been infinitely less obvious than here, it has nevertheless reversed inferior tribunals for their interference with the jury function: Cf., e.g., *McBride v. Toledo Terminal Railroad Company*, — U. S. —, 77 S. Ct. 1398 (1957). There, this Court reversed in a memorandum decision simultaneously with the grant of certiorari, as it has frequently done in cases of this type: See cases collected in Appendix to Mr. Justice Frankfurter's opinion in *Rogers v. Missouri Pacific Railroad Co.*, 352 U. S. 549-558, 77 S. Ct. 472 et seq. (1957); and *Shaw v. Atlantic Coast Line Railroad Company*, 353 U. S. 920, 77 S. Ct. 680, reh. den. 353 U. S. 951, 77 S. Ct. 859 (1957). There is a genuine necessity for reversal here, for

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2. *Rogers v. Missouri Pacific Railroad Co.*, *supra*, 352 U. S. 506, 77 S. Ct. 448.

not only did the lower court manifestly and arbitrarily deny plaintiff a jury trial, but from the face of its own opinion, it applied "wrong legal standards to the particular facts before it": *McBride v. Toledo Terminal Railroad Company*, — U. S. —, 77 S. Ct. 1398 (1957).

We sincerely urge that a more shocking interference with the jury function would be hard to imagine. A decision of this sort, in the face of the oft repeated pronouncements of this Court evinces "hostility to the federal statute",[3] and, as we have shown, is in sharp conflict with numerous decisions of this Court and various Courts of Appeals. It cries aloud for review and reversal.

It would be a monstrous thing to send this case back for a third trial. Indeed, the entire thrust of petitioner's argument is that the Alabama Supreme Court erred when it originally deprived petitioner of her jury verdict and ordered a new trial. Because that decision was not a final order of the highest court of the state, we were powerless to bring it here for review: Act of June 25, 1948, c. 646, 62 Stat. 929, 28 U. S. C. § 1257; *Davis Admrx. v. Alabama Great Southern Railroad Company*, 324 U. S. 846, 65 S. Ct. 676 (1945). Petitioner, therefore, found herself in the intolerable situation of having no additional evidence and having to go through the artificiality of a new trial on precisely the same evidence, suffering a directed verdict and then taking an appeal, the result of which was a foregone conclusion. To subject her to the ordeal of a third trial, four years later, when witnesses may well have died or disappeared and when memories have dimmed, would be a manifest injustice. This Court has the power to prevent such injustice. The Act of June 25, 1948, c. 646, 62 Stat. 963, 28 U. S. C. § 2106, provides:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court law-

3. *McBride v. Toledo Terminal Railroad Company, supra*, 77 S. Ct. 1398.

fully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Under that Act, this Court may direct that the judgment on the verdict be reinstated: *Stanley et al. v. Schwalby et al.*, 162 U. S. 255, 279-283, 16 S. Ct. 745, 764-766 (1896); *Jones National Bank v. Yates*, 240 U. S. 541, 36 S. Ct. 429 (1916); *Urie v. Thompson*, 337 U. S. 163, 196, 69 S. Ct. 1018, 1038 (1949). We respectfully urge that it would only "be just under the circumstances" for the Court to grant the Petition for Certiorari, reverse the judgment below and direct that the verdict of $46,600.00 for petitioner be reinstated together with such interest, costs and penalties as the law of Alabama provides.

Respectfully submitted,

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RECD APR 4 1955

THE STATE OF ALABAMA - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPRING TERM, 1955

6 Div. 736

Atlantic Coast Line Railroad Co.,

v.

Mildred S. Stinson, as Admx., etc.,

Appeal from Jefferson Circuit Court.

SIMPSON, JUSTICE.

This is an action instituted against the Atlantic Coast Line Railroad Company under the Federal Employers' Liability Act by Mildred S. Stinson, as administratrix of the estate of A. Bruce Stinson, deceased, to recover damages for his death. Liability is predicated upon the alleged negligence of the defendant in the operation of its railroad which allegedly caused the death of the deceased, while in its employment. Upon the trial there was a verdict for the plaintiff and a judgment rendered thereon. Motion for a new trial was overruled and hence this appeal.

Appendix.

Original Certified Opinion.

As submitted to the jury the complaint as last amended consisted only of count 5. In substance it alleged that A. Bruce Stinson was an employee of the defendant railroad and was killed while acting within the line and scope of his employment and that the defendant railroad was engaged in interstate commerce at the time of the death of deced . It was further alleged that the death of Stinson resulted from the negligence of one or more of the officers, agents or employees of the defendant, whose name and names are unknown to the plaintiff, while acting within the line and scope of their employment in this to-wit: that he or they so negligently operated the aforesaid railroad train of the defendant as to cause plaintiff's intestate to be run over, upon or against by the said railroad train and as a proximate result and consequence thereof plaintiff's intestate was killed.

The defendant filed a plea of the general issue in short by consent with leave to give in evidence any matter which would be admissible in evidence if well pleaded and with leave to the plaintiff to make like reply.

The proof shows that on August 6, 1951, the crew of Work Extra 1707 consisting of conductor L. B. Cloud, flagman C. C. Hayes, brakeman Joe Murphy, fireman W. P. Cook and engineer A. B. Stinson was called to work at Montgomery, Alabama, to report to Ramer, Alabama, to handle a wrecker for a train that had been derailed. When Work Extra 1707 arrived at Ramer they took over the work train, received the usual work train orders and proceeded to the place of the derailment, which was between 2-1/2 and 3 miles beyond Ramer. They arrived at the scene of the derailment at about 9:45 P.M. At this time Work Extra 1707 was made up of the following cars from the front to the rear:

1. Wrecker
2. Wrecker tank
3. Engine
4. Gondola car of tiles
5. Gondola car of coal
6. Flat car or wheel car
7. Bunk car
8. Kitchen car
9. Living and dining car
10. Caboose.

Upon arrival at the scene of the derailment all cars were cut from the engine except the wrecker cars. The engine and the wrecker cars were then moved forward by Stinson, the engineer, about four car lengths, nearer the derailment and "spotted". After the engine of Work Extra 1707 had been "spotted" by Stinson as aforesaid, its fireman Wm. F. Cook, upon receiving permission from Stinson, left the engine to go to the wreck and "to look around".

At 10:15 another train, the Western Wrecker, consisting of a total of five cars, arrived at the western end of the derailed cars. On this train was a fireman named McClain.

When fireman Cook returned to Work Extra 1707 fireman McClain of the Western Wrecker was in the engine cab of Work Extra 1707 but Stinson was not. McClain told Cook that Stinson had been on the engine when he reached it and had asked him (McClain) to look out for the engine "until Stinson or Cook returned".

There was proof that after Stinson had left his engine he went to the kitchen car of 1707 and ate a plate of food given him by the cook. He left the dining car, leaving his cap on a stool. Stinson did not return to his engine. He was never seen alive after having left the dining car. There was proof that at the time Stinson left the dining car the cars were standing still and they were not moved, according to conductor Cloud, until it was "right at 10:30". Other testimony shows that after rerailing the wrecked car there was a coupling movement to the rerailed car, a lowering of the boom on the wrecker, a coupling to the rest of the train and then that conductor Cloud, who watched this operation, walked back to the caboose at the rear of the train before the move actually started on his signal given from the rear end of the caboose.

Stinson was not found until about two or three hours later after he left the diner when W. C. Stripling, the engineer of Through Train 216, going towards Homer after the track had been cleared, discovered Stinson's finde body severed across the north rail of the track at a point something over three-fourths of a mile from where he had last been seen at the diner. The lower part of Stinson's body was between the rails with the feet angling down the hill toward the west. The upper part was outside the rail with the head turned downhill. The arms were pulled back to the shoulders, the hands were gripped and the body was naked except for the socks. His clothes were found "balled up" about 150 feet from the body toward the derailment. There was evidence of blood on the tracks and scuff marks to indicate he was dragged the 150 feet from the clothes to where the body was found.

There was proof showing that fireman Cook in Stinson's absence in operating the engine made three separate back-up moves. First, after coupling to the derailed hopper, he moved back two car lengths and stopped so that the boom of the wrecking derrick could be swung; second, he moved back the remaining two car lengths, separating the engine from the cut cars in order to couple; third, he moved back two and one-half to three miles to Ramer. This last move was made without incident at about ten miles per hour, the caboose being in the lead.

When the absence of Stinson was noted the train was inspected at Sprague which is a place on the railroad between Ramer and Montgomery. A lot of blood was found on the northeast wheel of the wheel car and a small amount of blood on the wheel next to it. Blood was also found on the body bolsters and truck bolsters of the same car. Portions of the stomach and lungs were found between the brackets of the wheel (a roll of metal cast into the inside of the wheel). There was no blood on the wheels of the caboose or of the other cars between it and the wheel car. So far as we can discover there is nothing in the record to show that any portion of the clothing of the deceased or any shred thereof was found beneath the wheel car or under any other part of the train.

The proof showed rules of the Atlantic Coast Line Railroad Company as follows:

As to Engineers (Enginemen)—Rule 972: "They must not leave their engines during a trip except in cases of necessity, and then the fireman or some other competent person must be left in charge of the engine."

Rule 973:—"They must not permit an unauthorized person to run the engine. They may permit the fireman to do so, but only under their immediate supervision."

As to Firemen. Rule 990:—"Firemen will report to the Trainmaster in all matters connected with the movement of trains and engines; to the Master Mechanic in all matters relating to motive power. They must comply with instructions of the Road Foreman of Engines and other Mechanical Department officers. They must comply with instructions of the enginemen (engineer) while on duty. At stations and yards they are under the jurisdiction of the Station Master or Road Master; within shop limits, of the Engine House Foreman."

Rule 991:—"They must remain on engines during switching operations, unless otherwise directed. They must take charge of the engine should the engineman be absent, and must not leave the engine during absence of engineman, nor permit any unauthorized person upon the engine. If engineman should become disabled they must stop the engine. They must not run an engine in the absence of the engineman unless it is necessary, they are directed to do so by the conductor or some other person in authority."

In addition to the rules governing to the firemen and engineer, the following rules exist:

"Rule 97:—The engine bell must be rung when an engine is about to move except in instances where the stop and start, either forward or backward, is momentary, and in a continuous switching move and while approaching and passing public crossings at grade, while passing trains on an adjacent track, and when necessary to prevent accidents."

Rule 32:—"The unnecessary use of the horn, whistle or bell is prohibited."

Rule 108:—"In case of doubt or uncertainty, the safe course must be taken."

The fundamental question in the case is whether the court erred in refusing the affirmative charge requested in writing by the defendant.

In reviewing the court's refusal to give the affirmative charge in Atlantic Coast Line R. Co. v. Ming, ___ Ala. ___, 73 Sout 85, this court said:

> "Error is predicated on the refusal of the court to give the general affirmative charge with hypothesis. It is well understood that actionable negligence may be established by circumstantial evidence. Atlantic Coast Line R. Co. v. Taylor, Ala. Sup., 71 So. 2d 27; Atlanta & St. Andrews Bay Ry. Co. v. Burnett, 259 Ala. 628, 68 So. 2d 726; Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916; Tennant v. Peoria & P.U.R. Co., 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520. Furthermore, where the affirmative charge was refused the defendant, the entire evidence must be viewed in its most favorable aspect to the plaintiff and where this is done and a reasonable inference may be drawn adverse to the party requesting the affirmative charge, such charge is properly refused. Atlantic Coast Line R. Co. v. Taylor, supra, and cases cited therein. * * *."

Under the plain provisions of the Federal Employers' Liability Act the gist of the action is negligence on the part of the defendant which proximately caused the injury complained of. The plaintiff is required to present probative facts from which the negligence alleged and the causal relation between the negligence and

the injury complained of can be reasonably inferred before such issues may be submitted to the jury. —Atlantic Coast Line Railroad Co. v. Barnes, 75 So2d 91; Reynolds v. Atlantic Coast Line Railroad Co., 251 Ala. 27, 36 So2d 102, affirmed 69 S. Ct. 507, 336 U.S. 207, 93 L. Ed. 618; Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916; Tennant v. Peoria & P.U.R.Co., 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520; Atlantic Coast Line Railroad Co. v. McKay, supra.

There are three cases strongly relied on by the appellee to which we wish to refer at this point. In Lavender v. Kurn, supra, the Supreme Court of the United States held that the case was a case for the jury, that actionable negligence may be established by circumstantial evidence and that where the jury returns a verdict on probative facts from which negligence which proximately caused the injury may reasonably be inferred, it is no answer to say that the jury's verdict involved speculation and conjecture. In Lavender v. Kurn, supra, it was shown that the decedent suffered the injuries from which he died at a place where his duties required him to be. The railroad contended that the decedent was murdered but the court held that where there was proof of probative facts from which it could be inferred that the negligence of the railroad caused the death of the decedent, the court on appeal would not disturb the verdict on the theory that the jury speculated as to whether death was the result of negligence or grew out of some other cause.

This court as it was its duty to do followed the reasoning in the foregoing decision of the Supreme Court of the United States in Atlanta & St. Andrews Bay Ry. Co. v. Burnett, 259 Ala. 688, 68 So2d 726, and in Atlantic Coast Line Railroad Co. v. McKay, supra,

and hold that since there was proof of probative facts from which the jury had a right to infer negligence of the defendant and that the decedent was killed by the railroad at a place where his duties to the railroad required him to be, the court would not speculate as to whether at the time of his death he was doing his duty or engaging in something not pertaining to his duty. We call attention to the fact that both in Atlanta & St. Andrews Bay R.W. Co. v. Barnett, supra, and Atlantic Coast Line R. Co. v. McKay, supra, the work of the decedent required him to work on the ground along side of or between the cars of the defendant railroad.

As we read the present record, there appears to be a conflict in the evidence as to whether fireman Cook in running the engine abided by the rules of the company in making the movements to which we have referred, in the absence of the engineer and in his failure to ring the bell at each movement. Upon a careful consideration it is our view that the plaintiff was entitled to go to the jury on these issues, which means that there was sufficient evidence for the jury to find that there was negligence on the part of the Atlantic Coast Line Railroad Company. Violation of one of defendant's rules is evidence of negligence. Tennant v. Peoria & P. U. R. Co., supra; Tiller v. Atlantic Coast Line, 323 U. S. 594, 65 S. Ct. 421; Alabama Great Southern Railroad Co. v. Davis, 246 Ala. 64, 18 So2d 737.

This brings us to what we regard as the vital question in the case, viz: the negligence, if any, of the defendant railroad proximately causing the death of Skinner?

The proof shows that Skinner's safe body was found covered across the rail of the track about three-fourths of a mile from where he had been seen alive over two hours before. All of his clothes except his socks which he had on were found "bunched up together" about 100 feet nearer to the place where he had last been seen alive than where his body was found. There were markings on the track indicating that something had been dragged between the place where the safe body was and the clothing. There was no evidence, however, as to how the engineer got from the place where he was last seen alive, to the place about three-fourths of a mile away. There was no evidence as to what he was doing and had been doing in the meantime. There was no evidence as to how he became safe. There was no evidence that he was alive and on the track at the time any train approached and passed the point where his body was found.

Can it be said that there was any evidence which showed that Skinner's body was found at a place where his duty required him to be, as was the situation in the cases cited above? The duties of Skinner required him to be on the engine in order to operate the engine as the engineer. We consider it to be a correct principle that when a railroad provides food for its employees and they are using the facilities so provided to prepare themselves for their work

or to rest and recuperate, they must be regarded as in its employ. — Easton v. D. L. & W. R. Co., 160 F2d 15 (CCA 2d 1947), cert. den. 332 U. S. 770, 68 S. Ct. 82 (1947); Virginia Ry. Co. v. Earle, 130 F2d 548 (CCA 4th, 1942); North Carolina R. Co. v. Zachary, 232 U. S. 248, 34 S. Ct. 305 (1914).

We consider that in going to the diner Stinson was acting within the line and scope of his employment. His next duty would be to return from the diner to the engine. However, as we have pointed out, there was no evidence as to what happened after he left the diner and we can only speculate as to what proximately caused Stinson's death and if it was in the course of his employment, there being no duty of Stinson to perform which we can infer that he was doing when he was struck by the movement of the train. Under all the evidence there was no duty on Cook to find out where Stinson was or to anticipate peril to him. Stinson had no duties to perform in between or along side the cars of the train, as was the situation in Atlanta & St. Andrews Bay Ry. Co. v. Bennett, supra, and Atlantic Coast Line Railroad Co. v. McKoy, supra, referred to above. — Alabama Great Southern R. Co. v. Davis, 246 Ala. 64, 18 So2d 737.

Consequently the evidence fails to show probative facts from which a jury could infer that when Stinson was run over by the train, he was where his duty required him to be. Since this is true, the evidence does not show that the negligence, if any, of the defendant proximately caused his death. — Brady v. Southern Railway Co., 320 U. S. 476, 88 L. Ed. 239; Reynolds v. Atlantic Coast Line R. Co., supra. In the last cited case the Supreme Court of the United States said:

12.

"A party claiming under the Act must in some adequate way establish negligence, and it must appear that such negligence was the proximate cause, in whole or in part, of the accident.

• • • • • • • • •

"In order to state a cause of action, it must be able to appear by proper averments [and, we interpolate, by proper proof] that the injury was the natural and probable consequence of the negligent or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

We conclude that the court was in error in refusing to give the affirmative charge as requested by the defendant in the lower court.

Reversed and remanded.

Livingston, C. J., Lawson and Merrill, JJ., concur.

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

6th *Div., No.* 736

Atlantic Coast Line Railroad Company, *Appellant*

vs.

Mildred S. Stinson, as Administratrix etc., *Appellee,*

From Jefferson *Circuit Court.*

The State of Alabama,
City and County of Montgomery,

I, J. Render Thomas, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing pages, numbered from one to twelve *inclusive, contain a full, true and correct copy of the opinion of said Supreme Court in the above stated case, as the same appears and remains of record and on file in this office.*

Witness, J. Render Thomas, Clerk of the Supreme Court of Alabama, this the 31st *day of*

March, *19* 55

J. Render Thomas

Clerk of the Supreme Court of Alabama

PUBLISHED OPINION.

ATLANTIC COAST LINE RAILROAD CO.

v.

MILDRED S. STINSON, as Adm'x.

6 Div. 736.

Supreme Court of Alabama.

March 31, 1955.

Rehearing Denied June 21, 1956.

STAKELY, Justice.

This is an action instituted against the Atlantic Coast Line Railroad Company under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., by Mildred S. Stinson, as administratrix of the estate of A. Bruce Stinson, deceased, to recover damages for his death. Liability is predicated upon the alleged negligence of the defendant in the operation of its railroad which allegedly caused the death of the deceased, while in its employment. Upon the trial there was a verdict for the plaintiff and a judgment rendered thereon. Motion for a new trial was overruled and hence this appeal.

As submitted to the jury the complaint as last amended consisted only of count 5. In substance it alleged that A. Bruce Stinson was an employee of the defendant railroad and was killed while acting within the line and scope of his employment and that the defendant railroad was engaged in interstate commerce at the time of the death of decedent. It was further alleged that the death of Stinson resulted from the negligence of one or more of the officers, agents or employees of the defendant, whose name and names are

unknown to the plaintiff, while acting within the line and scope of their employment in this to wit: that he or they so negligently operated the aforesaid railroad train of the defendant as to cause plaintiff's intestate to be run over, upon or against by the said railroad train and as a proximate result and consequence thereof plaintiff's intestate was killed.

The defendant filed a plea of the general issue in short by consent with leave to give in evidence any matter which would be admissible in evidence if well pleaded and with leave to the plaintiff to make like reply.

The proof shows that on August 6, 1951, the crew of Work Extra 1707 consisting of conductor L. B. Cloud, flagman C. C. Hayes, brakeman Joe Murphy, fireman W. F. Cook and engineer A. B. Stinson was called to duty at Montgomery, Alabama, to report to Ramer, Alabama, to handle a wrecker for a train that had been derailed. When Work Extra 1707 arrived at Ramer they took over the work train, received the usual work train orders and proceeded to the place of the derailment, which was between 2½ and 3 miles beyond Ramer. They arrived at the scene of the derailment at about 9:45 p. m. At this time Work Extra 1707 was made up of the following cars from the front to the rear:

1. Wrecker
2. Wrecker tank
3. Engine
4. Gondola car of ties
5. Gondola car of coal
6. Flat car or wheel car
7. Bunk car
8. Kitchen car
9. Living and dining car
10. Caboose.

Upon arrival at the scene of the derailment all cars were cut from the engine except the wrecker cars. The engine and the wrecker cars were then moved forward by Stinson, the engineer, about four car lengths, nearer the derailment and "spotted". After the engine of Work Extra 1707 had been "spotted" by Stinson as aforesaid, its fireman Wm. F. Cook, upon receiving permission from Stinson, left the engine to go to the wreck and "to look around".

At 10;15 another train, the Western Wrecker, consisting of a total of five cars, arrived at the western end of the derailed cars. On this train was a fireman named McClain.

When fireman Cook returned to Work Extra 1707 fireman McClain of the Western Wrecker was in the engine cab of Work Extra 1707 but Stinson was not. McClain told Cook that Stinson had been on the engine when he reached it and had asked him, (McClain) to look out for the engine "until Stinson or Cook returned".

There was proof that after Stinson had left his engine he went to the kitchen car of 1707 and ate a plate of food given him by the cook. He left the dining car, leaving his cap on a stool. Stinson did not return to his engine. He was never seen alive after having left the dining car. There was proof that at the time Stinson left the dining car the cars were standing still and they were not moved, according to conductor Cloud, until it was "right at 10:30". Other testimony shows that after rerailing the wrecked car there was a coupling movement to the rerailed car, a lowering of the boom on the wrecker, a coupling to the rest of the train and then that conductor Cloud, who watched this operation, walked back to the caboose at the rear of the train before the move actually started on his signal given from the rear end of the caboose.

Stinson was not found until about two or three hours later after he left the diner when W. C. Stripling, the engineer of Through Train 216, going towards Ramer after the track had been cleared, discovered Stinson's nude body

severed across the north rail of the track at a point something over three-fourths of a mile from where he had last been seen at the diner. The lower part of Stinson's body was between the rails with the feet angling down the hill toward the west. The upper part was outside the rail with the head turned downhill. The arms were pulled back to the shoulders, the hands were gripped and the body was naked except for the socks. His clothes were found "wadded up" about 150 feet from the body toward the derailment. There was evidence of blood on the tracks and scuff marks to indicate he was dragged the 150 feet from the clothes to where the body was found.

There was proof showing that fireman Cook in Stinson's absence in operating the engine made three separate back-up moves. First, after coupling to the rerailed hopper, he moved back two car lengths and stopped so that the boom of the wrecking derrick could be swung; second, he moved back the remaining two car lengths, separating the engine from the cut cars in order to couple; third, he moved back two and one-half to three miles to Ramer. This last move was made without incident at about ten miles per hour, the caboose being in the lead.

When the absence of Stinson was noted the train was inspected at Sprague which is a place on the railroad between Ramer and Montgomery. A lot of blood was found on the northeast wheel of the wheel car and a small amount of blood on the wheel next to it. Blood was also found on the body bolsters and truck bolsters of the same car. Portions of the stomach and lungs were found between the brackets of the wheel (a roll of metal cast into the inside of the wheel). There was no blood on the wheels of the caboose or of the other cars between it and the wheel car. So far as we can discover there is nothing in the record to show that any portion of the clothing of the deceased or any shred thereof was found beneath the wheel car or under any other part of the train.

The proof showed rules of the Atlantic Coast Line Railroad Company as follows:

As to Engineers (Enginemen)—Rule 972: "They must not leave their engines during a trip except in cases of necessity, and then the fireman or some other competent person must be left in charge of the engine."

Rule 973:—"They must not permit an unauthorized person to run the engine. They may permit the fireman to do so, but only under their immediate supervision."

As to Firemen. Rule 990:—"Firemen will report to the Trainmaster in all matters connected with the movement of trains and engines; to the Master Mechanic in all matters relating to motive power. They must comply with instructions of the Road Foreman of Engines and other Mechanical Department Officers. They must comply with instructions of the engineman (engineer) while on duty. At stations and yards they are under the jurisdiction of the Station Master or Road Master; within shop limits, of the Engine House Foreman."

Rule 994:—"They must remain on engines during switching operations, unless otherwise directed. They must take charge of the engine should the engineman be absent, and must not leave the engine during absence of engineman, nor permit any unauthorized person upon the engine. If engineman should become disabled they must stop the engine. They must not run an engine in the absence of the engineman unless, in an emergency, they are directed to do so by the conductor or some other person in authority."

In addition to the rules pertaining to the fireman and engineer, the following rules were shown.

"Rule 20:—The engine bell must be rung when an engine is about to move except in instances where the stop and start, either forward or backward, is momentary, and is a continuous switching move and while approaching and

passing public crossings at grade, while passing trains on an adjacent track, and when necessary to prevent accidents."

Rule 32:—"The unnecessary use of the horn, whistle or bell is prohibited."

Rule 108:—"In case of doubt or uncertainty, the safe course must be taken."

The fundamental question in the case is whether the court erred in refusing the affirmative charge requested in writing by the defendant.

In reviewing the court's refusal to give the affirmative charge in Atlantic Coast Line R. Co. v. McMoy, 261 Ala. 66, 73 So.2d 85, 90, this court said:

> "Error is predicated on the refusal of the court to give the general affirmative charge with hypothesis. It is well understood that actionable negligence may be established by circumstantial evidence. Atlantic Coast Line R. Co. v. Taylor, [260 Ala. 401] 71 So.2d 27; Atlanta & St. Andrews Bay Ry. Co. v. Burnett, 259 Ala. 688, 68 So. 2d 726; Lavender v. Kurn, 327 U.S. 645, 66 S. Ct. 740, 90 L.Ed. 916; Tennant v. Peoria & P. U. R. Co., 321 U.S. 29, 64 S. Ct. 409, 88 L.Ed. 520. Furthermore, where the affirmative charge was refused the defendant, the entire evidence must be viewed in its most favorable aspect to the plaintiff and where this is done and a reasonable inference may be drawn adverse to the party requesting the affirmative charge, such charge is properly refused. Atlantic Coast Line R. Co. v. Taylor, supra, and cases cited therein. * * *"

[1] Under the plain provisions of the Federal Employers' Liability Act the gist of the action is negligence on the part of the defendant which in whole or in part proximately caused the injury complained of. The plaintiff is required to present probative facts from which the negligence alleged

and the causal relation between the negligence and the injury complained of can be reasonably inferred before such issues may be submitted to the jury. Atlantic Coast Line Railroad Co. v. Barnes, 261 Ala. 496, 75 So.2d 91; Reynolds v. Atlantic Coast Line Railroad Co., 251 Ala. 27 36 So.2d 102, affirmed 336 U.S. 207, 69 S. Ct. 507, 93 L.Ed. 618; Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916; Tennant v. Peoria & P. U. R. Co., 321 U.S. 29, 64 S.Ct. 409, 88 L.Ed. 520; Atlantic Coast Line Railroad Co. v. McMoy, supra.

There are three cases strongly relied on by the appellee to which we wish to refer at this point. In Lavender v. Kurn, supra, the Supreme Court of the United States held that the case was a case for the jury, that actionable negligence may be established by circumstantial evidence and that where the jury returns a verdict on probative facts from which negligence which in whole or in part proximately caused the injury may reasonably be inferred, it is no answer to say that the jury's verdict involved speculation and conjecture. In Lavender v. Kurn, supra, it was shown that the decedent suffered the injuries from which he died at a place where his duties required him to be. The railroad contended that the decedent was murdered but the court held that where there was proof of probative facts from which it could be inferred that the negligence of the railroad in whole or in part proximately caused the death of the decedent, the court on appeal would not disturb the verdict on the theory that the jury speculated as to whether death was the result of negligence or grew out of some other cause.

This court as it was its duty to do followed the reasoning in the foregoing decision of the Supreme Court of the United States in Atlanta & St. Andrews Bay Ry. Co. v. Burnett, 259 Ala. 688, 68 So. 2d 726, and in Atlantic Coast Line Railroad Co. v. McMoy, supra, and held that since there was proof of probative facts from which the jury had a right to infer negligence of the defendant and that

the decedent was killed by the railroad at a place where his duties to the railroad required him to be, the court would not speculate as to whether at the time of his death he was doing his duty or engaging in something not pertaining to his duty. We call attention to the fact that both in Atlanta & St. Andrews Bay Ry. Co. v. Burnett, supra, and Atlantic Coast Line R. Co. v. McMoy, supra, the work of the decedent required him to work on the ground alongside of or between the cars of the defendant railroad.

[2, 3] As we read the present record, there appears to be a conflict in the evidence as to whether fireman Cook in running the engine abided by the rules of the company in making the movements to which we have referred, in the absence of the engineer and in his failure to ring the bell at each movement. Upon a careful consideration it is our view that the plaintiff was entitled to go to the jury on these issues, which means that there was sufficient evidence for the jury to find that there was negligence on the part of the Atlantic Coast Line Railroad Company. Violation of one of defendant's rules is evidence of negligence. Tennant v. Peoria & P. U. R. Co., supra; Tiller v. Atlantic Coast Line R. Co., 323 U.S. 574, 65 S.Ct. 421, 89 L.Ed. 465; Alabama Great Southern Railroad Co. v. Davis, 246 Ala. 64, 18 So.2d 737.

This brings us to what we regard as the vital question in the case. Did the negligence, if any, of the defendant railroad in whole or in part proximately result in the death of Stinson?

The proof shows that Stinson's nude body was found severed across the rail of the track about three-fourths of a mile from where he had last been seen alive over two hours before. All of his clothes except his socks which he had on were found "wadded up together" about 150 feet nearer to the place where he had last been seen alive than where his body was found. There were markings on the track indicating that something had been dragged between the place

where the nude body was and the clothing. There was no evidence, however, as to how the engineer got from the diner, the place where he was last seen alive, to the above spot about three-fourths of a mile away. There was no evidence as to what he was doing and had been doing in the meantime. There was no evidence as to how he became nude. There was no evidence that he was alive and on the track at the time any train movement approached and passed the point where his body was found.

[4] Can it be said that there was any evidence which showed that Stinson's body was found at a place where his duty required him to be, as was the situation in the cases cited above? The duties of Stinson required him to be on the engine in order to operate the engine as its engineer. We consider it to be a correct principle that when a railroad provides food for its employees and they are using the facilities so provided to prepare themselves for their work or to rest and recuperate, they must be regarded as in its employ.—Mostyn v. Delaware L. & W. R. Co., 2 Cir., 1947, 160 F.2d 15, certiorari denied 1947, 332 U.S. 770, 68 S.Ct. 82, 92 L. Ed. 355; Virginian Ry. Co. v. Early, 4 Cir., 1942, 130 F.2d 548; North Carolina R. Co. v. Zachary, 1914, 232 U.S. 248, 34 S.Ct. 305, 58 L.Ed. 591.

We consider that in going to the diner Stinson was acting within the line and scope of his employment. His next duty would be to return from the diner to the engine. However, as we have pointed out, there was no evidence as to what happened after he left the diner and we can only speculate as to what proximately caused Stinson's death and if it was in the course of his employment, there being no duty of Stinson to perform which we can infer that he was doing when he was struck by the movement of the train. Under all the evidence there was no duty on Cook to find out where Stinson was or to anticipate peril to him. Stinson had no duties to perform in between or alongside the cars of the train, as was the situation in Atlanta & St.

Andrews Bay Ry. Co. v. Burnett, supra, and Atlantic Coast Line Railroad Co. v. McMoy, supra, referred to above. Alabama Great Southern R. Co. v. Davis, 246 Ala. 64, 18 So.2d 737.

[5] Consequently the evidence fails to show probative facts from which a jury could infer that when Stinson was run over by the train, he was where his duty required him to be. Since this is true, the evidence does not show that the negligence, if any, of the defendant in whole or in part proximately caused his death. Brady v. Southern Railway Co., 320 U.S. 476, 64 S.Ct. 232, 88 L.Ed. 239; Reynolds v. Atlantic Coast Line R. Co., supra. In the last cited case this court said:

> "A party claiming under the Act must in some adequate way establish negligence, and it must appear that such negligence was the proximate cause, in whole or in part, of the accident.
>
> * * * * * *
>
> "In order to state a cause of action, it must be made to appear by proper averments [and, we interpolate, by proper proof] that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." [251 Ala. 27, 36 So.2d 104.]

We conclude that the court was in error in refusing to give the affirmative charge as requested by the defendant in the lower court.

Reversed and remanded.

LIVINGSTON, C. J., and LAWSON and MERRILL, JJ., concur.

OPINION ON SECOND APPEAL.

THE STATE OF ALABAMA

Judicial Department

THE SUPREME COURT OF ALABAMA

October Term, 1956-57

6 Div. 106

MILDRED S. STINSON, AS ADMINISTRATRIX, ETC.

v.

ATLANTIC COAST LINE RAILROAD COMPANY, A CORPORATION.

APPEAL FROM JEFFERSON CIRCUIT COURT.

MERRILL, *Justice.*

This is the second appeal in this cause. On the first trial in circuit court, judgment was entered in favor of plaintiff Stinson. On appeal, this court decided that the defendant, Atlantic Coast Line Railroad Company, was entitled to the affirmative charge, and the judgment was reversed and the cause remanded. *Atlantic Coast Line Railroad Co. v. Stinson*, 264 Ala. 522, 88 So. 2d 189. Under these circumstances, there being no final judgment, it was impossible to apply to the Supreme Court of the United States for a review of the decision of this court.

When the cause again came on for trial, the parties, by stipulation, submitted the cause to the jury on the identical pleadings, testimony, evidence and rulings of the court as on the original trial. The trial court properly gave the requested written affirmative charge for the defendant and plaintiff effected this appeal.

This court continues to hold that the affirmative charge was properly given, and that the judgment of the circuit court should be affirmed. For the sake of brevity, and to avoid the setting out of the orignal opinion verbatim, we hereby adopt the opinion in *Atlantic Coast Line Railroad Co. v. Stinson*, 264 Ala. 522, 88 So. 2d 189, as our opinion in the instant case.

We feel that we should correct the concurrences in our original opinion as listed in the printed reports. Upon original deliverance, Chief Justice Livingston, Justices Lawson and Merrill concurred in the opinion by Mr. Justice Stakely, as reported. On application for rehearing, Chief Justice Livingston was of the opinion that the application for rehearing ought to be granted. That necessitated the consideration of the opinion by the entire court. At that consultation, all the justices concurred except Chief Justice Livingston who dissented. The original record shows a notation of such dissent. This explanation is included only for the sake of accuracy.

The appellee in the instant cause has filed a motion to dismiss the appeal. We have carefully considered the grounds listed in the motion and those argued in brief, and we are of the opinion that in this particular case, they are not sufficient to warrant the dismissal of the appeal. Motion overruled.

Affirmed.

All the Justices concur, except Livingston, C. J., who dissents.

FINAL JUDGMENT.

THE SUPREME COURT OF ALABAMA

Thursday, June 20, 1957

The Court Met Pursuant to Adjournment

Present: Chief Justice Livingston and Associate Justices Lawson, Simpson, Stakely, Goodwyn, Merrill and Coleman.

6 Div. 106

MILDRED S. STINSON, AS ADMINISTRATRIX OF THE ESTATE OF A. BRUCE STINSON, DECEASED, SUING AS SUCH ADMINISTRATRIX,

v.

ATLANTIC COAST LINE RAILROAD COMPANY, A CORPORATION.

JEFFERSON CIRCUIT COURT.

No. 27471-X.

Come the parties by attorneys, and appellee's motion to dismiss the appeal, and the record and matters therein assigned for errors, being submitted on briefs and duly examined and understood by the Court, it is considered that appellee's motion to dismiss the appeal be and the same is hereby overruled.

IT IS FURTHER CONSIDERED that in the record and proceedings of the Circuit Court there is no error.

IT IS THEREFORE CONSIDERED, ORDERED, AND ADJUDGED, that the judgment of the Circuit Court be and the same is hereby in all things affirmed.

It Is Also Considered, Ordered, and Adjudged, that the appellant Mildred S. Stinson, as Administratrix of the Estate of A. Bruce Stinson, Deceased, and E. A. Jones and N. F. Jones, sureties on the appeal bond, pay the costs of appeal of this Court and of the Circuit Court.

And it appearing that said parties have waived their rights of exemption under the laws of Alabama, let execution issue accordingly.

CERTIFICATE.

THE STATE OF ALABAMA
Judicial Department
THE SUPREME COURT OF ALABAMA
October Term 1956-57

6 Div. 106.

MILDRED S. STINSON,
AS ADMINISTRATRIX, ETC.,

v.

ATLANTIC COAST LINE RAILROAD COMPANY,
A CORPORATION,

JEFFERSON CIRCUIT COURT,
No. 27471-X.

THE STATE OF ALABAMA,
CITY AND COUNTY OF MONTGOMERY,

I, J. Render Thomas, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing pages lettered A and B and numbered from 1 to 326, inclusive, contain a full, true and correct copy of the record and proceedings, and of the opinion, of said Supreme Court of Alabama in the above stated cause [except the Exhibits incapable of being included, which can be certified to the Clerk upon request of either party], as the same appear and remain of record on file in this office.

WITNESS, J. Render Thomas, Clerk of the Supreme Court of Alabama and the Seal of the Court attached at the Judicial Department Building in the City of Montgomery, this the 31st day of July, 1957.

J. RENDER THOMAS,
Clerk of the Supreme Court of Alabama.